

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
ABRAHAM RIOS,	:	
a/k/a "Junior"	:	
a/k/a "June"	:	NO. 96-0540-06

MEMORANDUM AND ORDER

HUTTON, J.

June 20, 1997

Presently before the Court is Abraham Rios' Motion for Dismissal of Count One, Relief from Misjoinder, and for Severance, and the Government's Response thereto.

I. BACKGROUND

Count One of the indictment alleges that the defendants in this case conspired to distribute and possess with the intent to distribute a substance containing a detectable amount of cocaine, in violation of Title 21 U.S.C. § 841(a)(1). Defendant Rios now moves this Court to Dismiss Count One against him on grounds that multiple conspiracies have been improperly joined in the single conspiracy count. Defendant Rios contends that this improper joinder would permit the jury to take into account the hearsay statements of other persons, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, who were in fact involved in separate and unrelated conspiracies.

Additionally, defendant Rios states that he is prejudiced by the presence of other defendants who engaged in unrelated

telephone conversations and/or transactions with the central figures in the case. Also, these other defendants have been previously convicted of serious or violent offenses. The defendant contends that such information about these other defendants would lead the jury to infer guilt as to him.

II. DISCUSSION

A. Appropriateness of Dismissing Count One

The defendant contends that Kotteakos v. United States, 328 U.S. 750 (1946), requires dismissal of Count One as to Defendant Rios because where the government alleges the existence of a single conspiracy in an indictment but presents evidence at trial indicative of more than one conspiracy, the variance between the indictment and the proof is in error. In Kotteakos, the Court stated that "[t]he only question is whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure" 328 U.S. at 752. The Court ruled that the petitioners did suffer substantial prejudice. Id. at 775. In United States v. Camiel, 689 F.2d 31 (3d Cir. 1982), the Court stated that Kotteakos impliedly establishes a two-pronged test for reversal: "(1) there must be a variance between the indictment and the proof, and (2) the variance must prejudice some substantial right of the defendant. Id. at 35.

The government states that the defendant's reliance on Kotteakos is misplaced because a finding of variance, by definition, is based upon a comparison of the government's proof with the allegations of the indictment. The government argues that for this reason, the Court cannot determine whether a variance has occurred, or assess its prejudicial effect, solely by reviewing the allegations of the indictment. Accordingly, the government states that the defendant's motion is premature.

In a conspiracy case, "it is the existence of a common scheme, and not any agreement among the parties to participate in it, that is critical." Camiel, 689 F.2d 31, 36 (3d Cir. 1982). In United States v. Camiel, 519 F. Supp. 1238 (E.D. Pa. 1981), the trial court found that there was a variance between the offenses charged in the indictment and the proofs offered at trial, and that the variance prejudiced substantial rights of each defendant. Id. at 1244.

This Court finds that a trial court's finding of variance and the prejudice of substantial rights of a defendant stemming from that variance, necessarily involves the evaluation of the evidence presented by the government. Consequently, the government must put forth the evidence before the Court can conduct its evaluation. Therefore, this Court finds that a motion requesting dismissal of Count One of the indictment against Defendant Rios due to prejudicial variance is premature. As such, the Defendant's motion with respect to dismissing Count One is denied.

B. Misjoinder and Severance

Defendant Rios next contends that he is entitled to a severance because of prejudicial joinder. The defendant states that "[d]ue to the varying times and persons encompassed by the indictment, [he] will be the victim of the 'spill-over' effect of the evidence against the other defendants." The government states that joinder of Defendant Rios with his alleged coconspirators is proper because the Defendant has failed to articulate any specific prejudice from his joinder.

Rule 8 of the Federal Rules of Criminal Procedure provides for the joinder of multiple defendants, and states as follows:

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). Joinder under Rule 8 promotes "economy of judicial and prosecutorial resources." United States v. Gorecki, 813 F.2d 40, 42 (3d Cir. 1987). The Supreme Court has noted that "there is a preference in the federal system for joint trials of defendants who are indicted together." Zafiro v. United States, 506 U.S. 534, 537 (1993). Additionally, "joint trials of defendants charged under a single conspiracy aid the finder of fact in determining the 'full extent of the conspiracy' and prevent 'the tactical disadvantage to the government from disclosure of its

case.'" United States v. Voigt, 89 F.3d 1050, 1094 (3d Cir. 1996)(citations omitted). Consequently, when defendants have been properly joined under Rule 8(b), "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."¹ Zafiro, 506 U.S. at 539. In order for a defendant to obtain relief due to failure to sever, he must demonstrate "clear and substantial prejudice resulting in a manifestly unfair trial." United States v. Sandini, 888 F.2d 300, 307 (3d Cir. 1989).

In the instant case, defendant Rios merely states that the "spill-over" effect from the evidence introduced against other defendants will substantially prejudice him. The defendant further states that "the probative value of the evidence in the case sub judice may be far stronger against some defendants than others." This Court finds that this generalized speculation of prejudice constitutes an insufficient reason to justify severance under Rule 14 of the Federal Rules of Criminal Procedure. The defendant has not presented evidence of "clear and substantial prejudice" that

1. Rule 14 states the Rule for Relief from Prejudicial Joinder, and provides as follows:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Fed. R. Crim. P. 14.

would result in a "manifestly unfair trial." Moreover, a jury is presumed to be "capable of sorting out the evidence applicable to each defendant and rendering its verdict accordingly." United States v. Elder, 90 F.3d 1110, 1120 (6th Cir. 1996). Also, even in situations where there is some risk of prejudice, it can be cured with proper instructions to the jury. Zafiro, 506 U.S. at 540-41 (stating as proper the charge that the jury must "give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her.")). Consequently, this Court finds that severance pursuant to Rule 14 of the Federal Rules of Criminal is not warranted. Therefore, this Court denies the defendant's Motion for Severance.

An appropriate Order follows.

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O R D E R

AND NOW, this 20th day of June, 1997, upon consideration of Defendant Abraham Rios' Motion for Dismissal of Count One pursuant to United States v. Kotteakos; for Relief from Misjoinder; and for Severance (Docket No. 88), and the Government's Response thereto, IT IS HEREBY ORDERED that the Defendant's Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.